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TAI SENG GLASS SDN BHD

v.

JASA KITA WAREHOUSING SERVICE SDN BHD

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COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
RAMLI ALI JCA
T SELVENTHIRANATHAN JCA
[CIVIL APPEAL NO: W-02-936-2001]

C

11 JUNE 2010

BAILMENT: *Bailee - Liability of bailee for loss or damage of goods in his custody - Whether bailee failed in its duty as bailee - Whether such failure rendered agreement on storage fees voidable at the option of the*

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bailor - Contracts Act 1950, ss. 104, 105, 106

CONTRACT: *Bailment - Duties and responsibilities of bailee - Duty to take care of bailor's goods as a reasonable man would have taken care of his own goods of the same volume and value - Right to be informed of the quality and value of the goods bailed - Whether bailee failed in its duty as*

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bailee - Whether such failure rendered agreement on storage fees voidable at the option of the bailor - Contracts Act 1950, ss. 104, 105, 106

TORT: *Negligence - Bailment - Bailee's duty of care - Duty to take care of bailor's goods as a reasonable man would have taken care of his own goods*

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of the same volume and value - Whether bailee failed in its duty as bailee

The plaintiff entered into an agreement with the defendant to store the plaintiff's goods at the defendant's bonded warehouse. Pursuant to the agreement, the plaintiff entrusted 48 cases of safety glass

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('the goods') to the defendant. The plaintiff had wanted its goods stored in a storeroom but due to lack of space, the plaintiff agreed to have its goods covered with tarpaulin and stored in an open yard at the defendant's warehouse. The plaintiff subsequently removed 11 cases with the glass in good condition. Later it was discovered that

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the remaining 37 cases of the glass had been damaged due to exposure to rain or water. The plaintiff commenced an action against the defendant in negligence for its failure to exercise the care required under ss. 104 and 105 of the Contracts Act 1950 ('the Act'). The defendant however denied negligence and instead

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counterclaimed against the plaintiff to recover unpaid storage charges. In the High Court, the judge in a brief judgment dismissed the plaintiff's claim with costs and instead allowed the defendant's counterclaim. The plaintiff appealed to the Court of Appeal.

Held (allowing the appeal with costs)
Per T Selventhiranathan JCA:

(1) When the goods were delivered to the defendant, a bailor-bailee relationship respectively was created between the parties pursuant to s. 101 of the Act. (para 42)

(2) In the instant case, the defendant as bailee of the plaintiff's remaining goods had not discharged the duty imposed upon it to take as much care of the goods as it should have throughout the period of bailment as a man of ordinary prudence would, under similar circumstances, have taken care of his own goods of the same bulk and value of the goods. The defendant therefore had failed in its duty as a bailee to take as much care of the remaining goods as it was bound to do under s. 104 of the Act. (paras 43-45)

(3) Since the defendant had fallen foul of s. 104 of the Act, that part of the agreement which required the plaintiff to pay the storage fees became voidable at the option of the plaintiff as bailor pursuant to s. 106 of the Act, justifying the plaintiff in not paying the storage fees under the agreement. The trial judge not only erred in dismissing the plaintiff's claim, she also erred in allowing the defendant's counterclaim. The trial judge had also erred in her decision as to the facts. (paras 46, 50)

(4) When the 48 cases of goods were entrusted to the care of the defendant in good condition and subsequently 11 of those crates were removed by the plaintiff in good condition, the onus was on the defendant to prove that it continued to exercise the same degree of care over the remaining 37 crates left in its custody and under its care. A duty lay on the defendant to show that the remaining 37 crates did not suffer the damage they sustained as a result of any neglect on the part of the defendant or its servants. This duty the defendant failed to discharge. At some point in time while the remaining 37 crates were still in the defendant's custody and care, they became exposed to water and were damaged as a result of that. The defendant therefore could not deny its responsibility for the 37 cases being damaged as it was obvious that this occurred because of neglect on the part of the defendant or its servants in failing to continue to keep the crates with the goods inside covered properly. (para 52)

(5) As a warehouseman and bailee of the goods, the defendant had a right to be informed of the quality and value of the goods bailed and any prudent warehouseman as bailee would have insisted on being so informed. The defendant could not then deny that it had no knowledge of the delicate nature of the goods, especially in light of the plaintiff's positive assertion that the defendant was so informed and acknowledged this by covering the goods at the outset itself. (para 53)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif membuat suatu perjanjian dengan defendan untuk menyimpan barang-barang plaintif di gudang dalam bon defendan. Menurut perjanjian, plaintif memberikan 48 kotak cermin keselamatan ('barang-barang') kepada defendan. Plaintif ingin barang-barang disimpan di dalam sebuah bilik stor tetapi disebabkan tiada ruang, plaintif bersetuju untuk barang-barang ditutup dengan kain tarpaulin dan disimpan di dalam suatu laman terbuka di gudang defendan. Plaintif kemudiannya mengeluarkan 11 kotak dengan gelas dalam keadaan baik. Ia selepas itu didapati bahawa 37 kotak gelas yang tinggal telah rosak akibat terdedah kepada hujan atau air. Plaintif memulakan suatu tindakan terhadap defendan dalam kecuaian disebabkan kegagalannya berhati-hati seperti yang diperlukan di bawah ss. 104 dan 105 Akta Kontrak 1950 ('Akta'). Defendan walau bagaimanapun menafikan kecuaian dan sebaliknya menuntut balas terhadap plaintif untuk mendapat balik caj penyimpanan yang belum dibayar. Dalam Mahkamah Tinggi, hakim dalam satu penghakiman yang ringkas menolak tuntutan plaintif dengan kos dan sebaliknya membenarkan tuntutan balas defendan. Plaintif merayu ke Mahkamah Rayuan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh T Selventhiranathan HMR:

(1) Apabila barang-barang dihantarkan kepada defendan, suatu perhubungan bailor-baili masing-masing telah diwujudkan di antara pihak-pihak menurut pada s. 101 Akta.

(2) Dalam kes semasa, defendan sebagai baili barang-barang plaintif yang tinggal tidak melepaskan kewajipan yang dikenakan atasnya untuk menjaga barang-barang dengan berhati-hati sepanjang jangka masa bailmen seperti seorang biasa yang hemat, dalam keadaan serupa, akan menjaga barang-barang sendirinya yang

besarnya dan nilainya sama seperti barang-barang. Defendan oleh itu telah gagal dalam kewajipannya sebagai baili untuk menjaga barang-barang yang tinggal seperti ia sepatutnya buat di bawah s. 104 Akta. A

(3) Oleh kerana defendan telah melanggar s. 104 Akta, bahagian perjanjian yang memerlukan plaintif membayar fi-fi penyimpanan menjadi tidak sah pada opsyen plaintif sebagai bailor mengikut s. 106 Akta, menjustifikasikan plaintif tidak membayar fi-fi penyimpanan di bawah perjanjian. Hakim perbicaraan bukan sahaja khilaf apabila menolak tuntutan plaintif, beliau juga khilaf dalam membenarkan tuntutan balas defendan. Hakim perbicaraan juga telah khilaf dalam keputusannya berdasarkan fakta-fakta. B C

(4) Apabila 48 kotak barang-barang telah diberikan untuk dijaga oleh defendan dalam keadaan baik dan kemudiannya 11 kotak tersebut telah dialihkan oleh plaintif dalam keadaan baik, onus adalah di atas defendan untuk membuktikan bahawa ia terus menggunakan kecermatan yang sama ke atas 37 kotak yang tinggal dalam dan di bawah penjagaannya. Defendan mempunyai suatu kewajipan untuk membuktikan bahawa 37 kotak yang tinggal tidak mengalami kerosakan tersebut disebabkan apa-apa pengabaian oleh defendan atau pekerja-pekerjanya. Defendan gagal melepaskan kewajipan ini. Pada suatu masa tertentu semasa 37 kotak yang tinggal masih berada dalam jagaan defendan, mereka telah terdedah kepada air dan telah rosak sebagai akibatnya. Defendan oleh itu tidak boleh menafikan tanggungjawabnya bagi kerosakan 37 kotak tersebut kerana ia jelas bahawa ini berlaku disebabkan pengabaian oleh defendan atau pekerja-pekerjanya dalam kegagalan mereka untuk terus menyimpan kotak-kotak dengan barang-barang dalamnya ditutup dengan betul. D E F G

(5) Sebagai pemilik gudang dan baili barang-barang, defendan berhak diberitahu tentang kualiti dan nilai barang-barang di bawah jaminan dan mana-mana pemilik gudang yang hemat sebagai baili akan mendesak untuk diberitahu sebegitu. Defendan kemudiannya tidak boleh menafikan bahawa ia tidak mempunyai pengetahuan tentang sifat mudah pecah barang-barang, terutamanya memandangkan penegasan positif plaintif bahawa defendan telahpun diberitahu sedemikian dan mengiktirafnya dengan menutupi barang-barang pada permulaannya. H I

Case(s) referred to:

Abdul Rahman v. Ariffin [1956] 1 LNS 4 HC ***(refd)***

Hong Realty (Pte) Ltd v. Chua Keng Mong [1994] 3 SLR 819 ***(refd)***

Jaya Jusco Stores Sdn Bhd v. Sime Darby Security Services Sdn Bhd & Ors [1999] 1 LNS 175 HC ***(refd)***

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

Lembaga Pelabohan Swettenham v. Syarikat Hiap Bee [1975] 1 LNS 85 FC ***(refd)***

Leong Brothers Industries Sdn Bhd v. Jerneh Insurance Corp Sdn Bhd [1991] 1 CLJ 135; [1991] 3 CLJ (Rep) 152 HC ***(refd)***

Malayan Thread Co Sdn Bhd v. Oyama Shipping Line Ltd & Anor [1972] 1 LNS 82 HC ***(refd)***

Port Swettenham Authority v. TW Wu and Co (M) Sdn Bhd [1975] 1 LNS 124 FC ***(refd)***

Port Swettenham Authority v. TW Wu and Company (M) Sdn Bhd [1978] 1 LNS 146 PC ***(refd)***

Ramachandran Mayandy v. Abdul Rahman Ambok Laongan & Anor [1996] 1 LNS 109 HC ***(refd)***

Rothmans of Pall Mall (M) Bhd v. Neo Kim Har & Anor [1989] 1 CLJ 59; [1989] 2 CLJ (Rep) 404 HC ***(refd)***

Seino Merchants Singapore Pte Ltd v. Porcupine Pte Ltd [2000] 1 SLR 99 ***(refd)***

Sharikat Lee Heng Sdn Bhd v. Port Swettenham Authority [1971] 1 LNS 133 FC ***(refd)***

Sime Darby Ltd v. Port Swettenham Authority [1966] 1 LNS 179 HC ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697 HC ***(refd)***

Tithes Dental & Photo Supply Sdn Bhd v. Empresa Lineas Maritimes Argentinas & Ors [1977] 1 LNS 147 FC ***(refd)***

United Engineers (Malaysia) Bhd v. Yeong Sinn Hoong [1989] 1 LNS 125 HC ***(refd)***

Watt (Or Thomas) v. Thomas [1947] 1 All ER 582 ***(refd)***

Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd [1993] 3 CLJ 188 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 101, 103, 104, 105, 106

Evidence Act 1950, ss. 91, 92, 114(g)

Other source(s) referred to:

Halsbury's Laws of Malaysia, vol 20, para 340.045

For the appellant/plaintiff - Charanjit Singh Saini; M/s CS Saini & Assoc

For the respondent/defendant - Normah Mohd Desa; M/s Soo Thien Ming & Nashrah

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S7-23-379-1988]

Reported by Andrew Christopher Simon

JUDGMENT

T Selventhiranathan JCA:

[1] The appellant herein, Tai Seng Glass Sdn Bhd, was the plaintiff ("the plaintiff") in the civil suit it brought against the respondent herein, Jasa Kita Warehousing Service Sdn Bhd ("the defendant"), in the High Court in Malaya at Kuala Lumpur.

[2] By its statement of claim, the plaintiff averred materially as follows:

1. …

2. …

3. By an agreement evidenced by a letter dated 14th November 1985 the defendant agreed to store the plaintiff's goods at the defendant's bonded warehouse at Port Klang, Selangor upon the terms and conditions thereon appearing.

4. On or about the 19th day of November 1985 the plaintiff entrusted to the defendant forty-eight [48] cases containing a total of one thousand five hundred and five [1,505] pieces of 2100 x 1180 mm of 6.5 mm laminated bronze safety glass [hereinafter referred to as the 'said goods'] and the defendant undertook to take due and/or proper care of the said goods whilst the said goods were under the charge of the defendant.

5. The defendant did not take due and/or proper care of the said goods thereby causing thirty-seven [37] cases totaling one thousand one hundred and sixty-three [1,163] pieces of laminated bronze safety glass to be damaged whilst under the care of the defendant.

6. In the alternative the defendant was negligent in the care of the said goods and by reason of its default thirty-seven [37] cases totaling one thousand one hundred and sixty-three [1,163] pieces of laminated bronze safety glass were damaged.

Particulars of Negligence and/or Statutory Duty

(a) Failure to take due and proper care of the said goods;

(b) Failure to ensure that the said goods were not subjected to exposure to rain water or other water;

(c) Allowing the said goods to be exposed to rain water or water;

(d) Failing to ensure that the defendant's warehouse was free of water or moisture;

(e) Failing to store the said goods in the defendant's warehouse at all material times;

(f) Leaving the said goods outside the defendant's warehouse thereby causing the said damage;

(g) Failing to carry out proper inspections of the said goods to ensure that the said goods were in proper condition;

(h) Failing to immediately clean, dry or wipe the said goods upon the said goods becoming wet to ensure that the said goods were not damaged;

(i) Failing to inform the plaintiffs their servant or agent of the damage to the said goods;

(j) Allowing the said goods to be damaged;

(k) Failing to store the said goods in a suitable space;

(l) Failing to exercise the care required under sections 104 and 105 of the Contracts Act 1950 in respect of the defendant's *(sic)* goods.

The plaintiff will further rely on the doctrine of *res ipsa loquitor.*

7. By reason of the matters aforesaid the plaintiff has suffered loss and damage in that the thirty-seven [37] cases containing one thousand one hundred and sixty-three [1,163] pieces of laminated bronze safety glass have been unsuitable for the purpose for which they were purchased.

Particulars of Loss and Damage

(a) Replacement value at £40.92 per piece [CIF] [£40.92 x 1163]	=	47,589.96 Pds sterling
Exchange rate as at 13th July 1988 £47,589.96 x $4.37	=	M$207,968.08
(b) LCL/FCL charges	=	M$ 195.00
(c) Port charges	=	M$ 23.18
(d) Adjuster's report	=	M$ 122.00

(e) Loss of profit @ 30 % [30% of $ 207, 968.08] = M$ 62,390.42

(f) Refund of storage charges from 19.11.85 to October 1987, ie 23 months at $416.09 per month = M$ 9,570.07

M$280,268.75

8. Despite repeated demands by the plaintiff and/or its solicitor the defendant has failed, neglected, omitted and/or refused to pay to the plaintiff the said sum of $280,268.75.

Wherefore the plaintiff claims:

(a) the said sum of $280,268.75.

(b) interest thereon from 25th January 1988 to the date of judgment;

(c) interest on the judgment sum at 8% per annum until payment or realisation;

(d) costs;

(e) such further or other relief as this honourable court may deem fit.

Dated the 11th day of July 1988.

[3] The defendant filed its defence dated 6 September 1988 and subsequently amended its defence and added a counterclaim on 5 June 1997, almost ten years later.

[4] By the amended defence and counterclaim, the defendant contended as follows:

1. The defendant has no knowledge of paragraph 1 of the statement of claim.

2. The defendant admits paragraph 2 of the statement of claim.

3. Save in so far that the defendant entered into an agreement with the plaintiff by letter dated 14th November 1985 the defendant denies the rest of the averments in paragraph 3 of the statement of claim.

4. Save in so far that the plaintiff entrusted to the defendant forty-eight [48] crates of laminated bronze *[sic]* [hereinafter referred to as 'the said goods'] the defendant denies the rest of the averments in paragraph 4 of the statement of claim.

5. The defendant denies paragraphs 5 and 6 of the statement of claim, and the particulars of negligence and/or statutory duty. The defendant denies that it failed to take due and proper care of the said goods. If [which is not admitted] the said goods were damaged while in the defendant's possession, the said damage was not caused by any default or neglect of the defendant or its employees.

6. The defendant will further aver that the doctrine of *res ipsa loquitor* has no application to the facts of this case.

7. The defendant denies paragraphs 7 and 8 of the statement of claim.

8. Save as hereinbefore expressly admitted each and every one of the allegations in the statement of claim is denied as if the same were herein specifically set out and traversed *ad seriatim.*

9. Wherefore the defendant prays that the plaintiff's claim be dismissed with costs.

Counterclaim

10. The defendant repeats and reiterates paragraphs 3 to 7 of the defence.

11. Pursuant to the agreement between the plaintiff and the defendant by letter dated 14.11.1985, the plaintiff agreed to pay the defendant storage charges at the rate of RM0.70 per square foot.

12. In breach of the said agreement the defendant has failed to pay the storage charges from November 1987 amounting to as at 31.3.1997 RM47,018.17.

Wherefore the defendant counterclaims:

(i) the sum of RM 47,018.17 as at 31.3.1997;

(ii) interest thereon at the rate of 8% per annum from the date hereof to the date of full payment;

(iii) such further or other relief that this honourable court may deem fit; and

(iv) costs.

[5] The plaintiff's reply and defence to the counterclaim was dated 27 March 1998 and it took the following form:

Reply and Defence To Counterclaim Reply

1. The plaintiffs join issue with the defendants on paragraphs 1 - 9 of the defence save in so far as the same consists of admissions.

2. In reply to paragraph 3 of the amended defence the plaintiffs aver that the defendants having admitted to entering into the agreement dated 14th November 1985 with the plaintiffs are estopped from denying the terms of the agreement as contained therein.

3. As regards paragraph 4 of the amended defence the plaintiffs aver that the defendants were entrusted with 48 crates of laminated bronze safety glass and not 'laminated bronze' as stated in paragraph 4 of the amended statement of defence.

4. In reply to paragraphs 5 and 6 of the amended defence the plaintiffs aver that the plaintiffs will rely on the agreement dated 14th November 1985 at the trial of this matter for its full terms and effects.

Defence to Counterclaim

5. As to the defendants' counterclaim the plaintiffs state that the defendants' counterclaim is misconceived in law and in fact.

6. The plaintiffs admit paragraph 11 of the counterclaim and state that the plaintiffs agreed to pay the agreed storage charges in consideration of the defendants agreeing to store the plaintiffs' goods pursuant to and in compliance with the agreement dated 14th November 1985.

7. In breach of the agreement dated 14th November 1985 the defendants failed neglected omitted and/or refused to take the necessary care of the plaintiffs' goods as required under the agreement dated 14th November 1985 or as required to pursuant to law and equity.

8. The plaintiffs' goods comprising 48 crates of laminated bronze safety glass were delivered and entrusted to the defendants, their servants or agents on or about 19th November 1985 at their bonded warehouse in Port Klang.

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9. On or about 13th November 1985 and 22nd September 1986 the plaintiffs removed 1 crate and 10 crates respectively of the laminated bronze safety glass from the plaintiffs' *(sic)* bonded warehouse leaving a balance [of] 37 crates with the plaintiffs *(sic)*.

B

10. In or about early in 1988 the plaintiffs discovered that the remaining 37 crates of the plaintiffs' goods had been damaged by water resulting from the defendants their servants and/or agents' negligence or failure to take the necessary care of the plaintiffs' goods.

C

11. In further breach of the agreement dated 14th November 1985 the defendants failed to take out any or any sufficient insurance cover for the plaintiffs' goods.

12. As a result of the defendants' breach of agreement and failure
D to take the necessary care or due care of the plaintiffs' goods delivered and entrusted to the defendants the plaintiffs' goods were damaged made unusable or unsalable.

13. In the premises and for the aforesaid reasons the plaintiffs are not obliged in law or in equity to pay for the storage charges
E claimed by the defendants.

14. Alternatively the plaintiffs allege that the calculation of the storage charges is wrong and misconceived in law and in equity.

F

15. Save as is hereinbefore expressly admitted the plaintiffs deny each and every allegation of fact contained in paragraphs 10 to 12 of the counterclaim as if the same were set forth herein and specifically traversed.

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[6] A statement of agreed facts also signed by the solicitors for the defendant was filed. It stated as follows:

Statement of Agreed Facts

1. By a letter dated 14.11.1985, the defendant offered to the
H plaintiff its bonded warehouse for storage of the plaintiff's goods on arrival at Port Klang ['the said agreement']. The terms and conditions of storage of the plaintiff's goods at the defendant's warehouse as contained in the said agreement were duly accepted by the plaintiff.

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2. On 19.11.1985, a consignment of 3 open top containers containing 48 cases of laminated bronze safety glass which was purchased by the plaintiff arrived at Port Klang on board a

vessel known as 'Hamburg Express'. On arrival the containers were transported by the plaintiff's agent to the defendant's bonded warehouse for storage as per the said agreement.

3. The plaintiff had in 1988 checked the consignment of laminated bronze safety glass at the defendant's warehouse and found the same to be damaged. Thereafter, the plaintiff in March 1988 instructed surveyors to conduct a survey on the consignment to ascertain the cause of damage.

4. The surveyors have *vide* their report dated 5.3.1988 stated that the damage to the laminated bronze safety glass was caused due to water seepage through the sealant between the glass. The fact that the laminated bronze safety glass is damaged is not in dispute.

5. The dispute is whether the damage occurred during the period of storage at the defendant's warehouse. If the damage occurred during the period of storage at the defendant's warehouse [which is denied], whether it was due to the defendant's failure to take all reasonable care as a general warehouseman.

[7] The case proceeded to trial with a total of five witnesses testifying, three for the plaintiff and two for the defendant. The learned trial judge commenced the trial of the action on 15 April 1998 and concluded it on 4 January 2000. She then delivered her decision on 28 September 2001 whereby she dismissed the plaintiff's claim with costs and entered judgment for the defendant on the counterclaim.

[8] The plaintiff appealed against her decision. We heard the appeal on 2 December 2009, allowed it, set aside the order of the High Court and entered judgment for the plaintiff in terms of the statement of claim and dismissed the counterclaim. We awarded the plaintiff costs of RM15,000 in respect of the trial in the High Court and the appeal before us with the deposit being refunded to the plaintiff in its capacity as the appellant before us. We also delivered our grounds of judgment extempore on that date and now proceed to give an elaboration of the grounds in this judgment.

[9] In hearing the appeal, we and the parties were handicapped in that we did not have the benefit of the grounds of judgment of the learned trial judge to consider her evaluation of the evidence which propelled her to arrive at the decision which she made. Her decision is contained in two brief paragraphs which read as follows:

Decision:

After giving due consideration to the evidence adduced by both parties and the written submissions of both learned counsel, I am satisfied that the defendant has proven that it has discharged its common law and statutory duty of care to the plaintiff and that the plaintiff's claim is without any basis or merit whatsoever. As such the plaintiff's claim is dismissed with costs.

In respect of the defendant's counterclaim, I am also satisfied that the defendant had adduced evidence that the sum due is RM62,413.50 until April 2000 [exhibit D16]. As such judgment is entered accordingly to the defendant on the counterclaim.

tt: Datin Paduka Rahmah Hussain.

[10] The above paragraphs do not constitute a reasoned decision as they merely state the conclusion that the learned trial judge arrived at. In these circumstances, we as an appellate court had to evaluate the evidence afresh in order to arrive at a conclusion which was justified by the facts.

[11] The undisputed facts disclosed that the defendant received from the plaintiff three open-top containers containing forty-eight crates of laminated bronze safety glass ("the goods") on 19 November 1985. The goods were placed in the defendant's bonded warehouse for storage in accordance with the agreement between the parties ("the agreement"). There was no complaint or protest from the defendant when the goods were received that they were otherwise than in good condition.

[12] Around 13 December 1985, the plaintiff removed one crate of the goods from the defendant's custody and care, leaving forty-seven crates behind. The goods in that one crate that was removed were found to be in good condition at the time of their removal.

[13] On 22 September 1986, a further ten crates of the goods were removed by the plaintiff from the defendant's custody and care and the goods in those ten crates were also found to be in good condition at the time of their removal.

[14] A director of the plaintiff, one Mr See Chon Toh @ Su Chong Toh, PW3, testified that the goods were stored in an open yard when delivered into the defendant's custody and care. He wanted them stored in a storeroom as they would get spoilt if stored in an open yard but the defendant's representative assured him that

the goods would be covered with tarpaulin to protect them as the defendant did not have any space to store the goods in the storeroom (ie in the covered warehouse). Based on this assurance, PW3 agreed to the storage of the goods in the open yard. Furthermore, the storage of the goods in the open yard was in accordance with the agreement. However, the crates with the goods inside were covered in the open yard by tarpaulin.

[15] When PW3 removed the one crate of goods from the defendant's open yard on or about 13 December 1985, he saw that all forty-eight crates were securely covered by tarpaulin and the goods in the one crate he removed were in good condition and there was no evidence that the other forty-seven crates were damaged.

[16] On or about 22 September 1986, another ten crates of the goods were similarly removed by PW3 from the defendant's open yard and the remaining thirty-seven crates of goods were again covered.

[17] However, when PW3 went to the defendant's premises to remove further crates of goods, he found that the defendant had relocated to new premises. PW3 had not been informed that the defendant was moving to new premises.

[18] PW3 went to the new premises and found the goods wet with water although they were now in a covered warehouse. He knew the goods were wet with water because he saw marks of water on the paper covering the sheets of glass. The crates were not covered properly with tarpaulin as the tarpaulin was only put on top. Furthermore, the tarpaulin was damaged as it was full of holes. Upon enquiry, he was informed by the defendant's supervisor that when the defendant moved to the new premises, the crates of goods were placed in the open, ie, "outside and they became wet when it rained". Only subsequently did the defendant move the crates into the covered warehouse at the new premises.

[19] He identified the supervisor as one Mr Low Cheng Peng, who was in fact the assistant operations manager of the defendant at the material time. He testified for the defendant as DW2.

[20] PW3 told DW2 that the sheets of glass that had been wet by water must have been damaged and DW2 informed him that he did not know that the sheets of glass would be damaged if wet by water.

[21] The plaintiff's employees opened the crates and upon examination by the employees and PW3 and DW2, the sheets of glass were found to be damaged. DW2 then asked if the glass could be cleaned with chemicals to which PW2 replied that it could not be done. However, DW2 purchased some chemicals and tried to clean the glass but was unsuccessful. PW3 confirmed that there were rainbow colours in the glass as a result of water seepage and he subsequently engaged an adjuster to prepare a survey report. This report was prepared by one Encik Yusof bin Gulam, a marine surveyor in the employment of a company called Caleb Brett Sdn Bhd. He testified for the plaintiff as PW1.

[22] During cross-examination, PW3 agreed that the storage of the goods was at an open yard. He did not know whether it was stated (in the agreement) that the storage had to be in a warehouse. Learned counsel for the plaintiff conceded at this juncture that there was nothing in the agreement to say that the goods should be covered.

[23] However, PW3 went on to say that he wanted the goods to be stored in the warehouse itself but the defendant informed him that there was no space in the warehouse, that the goods would be covered with a tarpaulin and that the plaintiff would be protected by risk insurance. With that assurance PW3 agreed for the goods to be stored in the open yard. He agreed that there was no confirmation of this in writing.

[24] It was then put to him that when the goods came in, they were to be placed in the yard in the condition in which they came. He denied that this was true.

[25] But more tellingly, the defendant conceded that the goods were covered with tarpaulin in the open yard but for a different reason and not to protect them from damage by water when the following question was put to PW3:

> Q : My instruction further is that when they covered your goods with tarpaulin, they fear *(sic)* that the glass would break and not that they would be destroyed by water?

PW3 disagreed with this suggestion and stated that with the defendant's assurance that the goods would not be damaged (by water), he agreed to store the goods in the open yard. The assurance that the goods would be covered with tarpaulin was important to him. He agreed that the assurance was made orally and that he did not confirm this in writing.

[26] PW3 also agreed with the question that was put to him that if the goods were stored in the warehouse, they would not have to be covered by tarpaulin and that it would not matter if the tarpaulin had holes in it.

[27] Further cross-examination of PW3 elicited the following facts:

(a) the goods were packed in wooden crates which had gaps in between, allowing water to get to the laminated glass through the gaps;

(b) if water got into the wooden crates, they should be opened and each piece of glass should be removed and cleaned;

(c) he did not inform the defendant of this as he expected the defendant to inform him should that happen;

(d) he would have allowed the defendant to open the crates if the defendant wanted to inspect them;

(e) the goods (laminated glass) could not be damaged by exposure to the sun;

(f) the crates were raised and placed outside the warehouse on two pieces of plank and he disagreed that they were placed directly on untarred stones or pebbles;

(g) the first time he took out one crate of the goods was on 13 December 1985, about one month after he had stored the goods with the defendant;

(h) the second time he removed the goods was on 22 September 1986 when the goods had already been in the open for about ten months;

(i) on both the above occasions, there was no damage to the goods and so he let the remaining goods to be continued to be kept in the open;

(j) he disagreed that there was no representation by the defendant that there was no space indoors and that he chose to put the goods outside;

(k) he agreed that up to 22 September 1986 the defendant had taken good care of the goods;

A (l) he left the goods in the open as the defendant had agreed to take care of the goods;

(m) the third time he went to remove the goods was in early 1988 when DW2 informed him that while the defendant was shifting
B warehouse, the goods had been wet by the rain;

(n) the defendant needed to cover the goods with tarpaulin as they were kept in the open;

(o) he corrected his testimony given in examination-in-chief by
C saying that it was he, and not DW2, who purchased the chemicals to try and clean the goods (ie the laminated glass);

(p) all the eleven crates of goods he took out on the earlier two occasions from the open yard were sold.

D **[28]** The re-examination of PW3 resulted in the eliciting of the following facts from the plaintiff's standpoint:

(a) there was no occasion when the goods were stored uncovered in the open yard;

E

(b) when the goods were delivered to the defendant, they were covered;

(c) the crates were placed on two wooden beams and stacked on top
F (of one another);

(d) if the goods had not been covered from rain, he would not have stored them in the open yard as they would have become wet and would have been damaged during the first rainfall as the goods (ie the laminated glass) were wrapped in paper and the
G crates had gaps in them;

(e) on the first and second occasions he went to remove the eleven crates of goods, they were still covered with tarpaulin and they were not wet or damaged, and the other crates were not wet or
H damaged either;

(f) on both occasions when the goods were removed, the other remaining goods were covered up again with tarpaulin;

(g) on the third occasion that PW3 went to collect the goods, the
I goods had been moved to new premises and were in a covered warehouse.

[29] The defendant called two witnesses, namely, one Mr Kok Kooi Cha'o, DW1, who was the defendant's accounts executive, and DW2. DW1's evidence did not amount to much and was not helpful except to attempt to assert that there was available covered storage space in the defendant's warehouse when the plaintiff placed its goods in the defendant's custody and care. However, in cross-examination, it was evident that his calculation of the available covered storage space was inaccurate as he conceded that his calculation did not take into consideration the passageways and space for walking around which "would run into thousands of square feet" and that he did not know what the area was that was so taken up.

[30] DW2 testified in examination in-chief that the defendant provided warehouse services of two kinds, namely, covered storage and open-yard storage. The plaintiff's goods were stored in an open yard as per the agreement between the parties. He knew that the goods comprised laminated glass but he was not informed that the goods "should not be touched by water". He also said covered storage was available and that PW3 was wrong in saying that "there was no space in the warehouse". He denied that the plaintiff or its representative was informed that the goods would be covered with tarpaulin so as not to be affected by water. Neither did the plaintiff not its representative instruct him or the defendant that the goods should be covered with tarpaulin so as not to be affected by water. The goods were placed directly on the ground without any base. The ground was of earth and pebbles. He conceded that some of the crates were covered by tarpaulin. He claimed that he did this because he "was concerned for the breakage of glass" as the "glass was too exposed and not packed properly in the crates" and therefore he "took precautions on my own initiative to minimize the risk of breakage". Not all the forty-eight crates of goods were covered by tarpaulin, only about thirty crates were so covered while the rest were covered by planks which "were placed on top of the glass". The tarpaulin did not have holes in it.

[31] DW2 stated further that in July 1987 the defendant shifted to new premises and the remaining thirty-seven crates of goods were stored in the defendant's covered warehouse "to give better protection to the goods" and that this was done out of the defendant's own initiative and "out of our goodwill to the client". The goods were placed directly on the cemented floor and some of them were covered by tarpaulin or planks. DW2 further stated that when the goods were moved from the old to the new premises, they

were not stored outside where they would have been exposed to rain or got wet prior to being moved to the covered warehouse. However, when the goods were moved from the old to the new premises, there were water marks on the paper layer of the goods. In his opinion the water marks were made "probably when the goods were stored in the open yard". He denied telling PW3 that the crates became wet when they were placed outside the new warehouse (after shifting to the new premises).

[32] At the beginning itself of cross-examination, DW2 at first said he was not aware of the plaintiff's goods being damaged and then he said he was aware. He stated that the goods were received in good order except for one case and that they were not wet when received. He stated that some parts of the goods were covered with canvas and tarpaulin and some parts were covered with planks. He concluded this part of his testimony as follows:

> I don't mean to cover them from rain.

He was not sure if PW3 was there when he covered the goods but the forwarders were there and they did not object. He did not agree when it was put to him that when the goods arrived, he covered all of them with tarpaulin and properly secured the tarpaulin.

[33] He confirmed that out of three hundred and sixty-five days in a year, it would rain at least half that time in Port Klang (ie where the goods were kept). He also agreed that if the goods were packed and left open (ie uncovered), they would definitely get wet the first time it rained. This was followed by the following question which was not answered:

> Q : Do you think it is ridiculous that the goods were not covered?
>
> A : [No answer].

There then followed this series of questions and answers:

> Q : Do you think you were acting in a negligent manner or not acting as a reasonable man in accepting the goods and not covering them properly?
>
> A : I don't agree. The goods were left on the ground on the sand and pebbles. The goods were not placed on pallets.
>
> Q : Was this also not a negligent act?
>
> A : No.

Q : Mr See and Mr Daniel Wong have given evidence that the goods were placed on the pallets.

A : I still disagree.

Q : Again, I put it to you, you are not telling the truth?

A : I don't agree. I am telling the truth.

Q : If you don't place pallets under the cases, how do you expect the forklift to lift the goods?

A : The forklifts cannot lift the case – without the pallets.

Q : Do you agree that if there are no pallets the water would flow under the case?

A : Yes and the boxes will get wet.

Q12 – Statement of witness refers:

Q13 – Statement of witness refers:

Q : Are you saying that the goods in the open yard are not covered, you are exposing them to rain, sun and thunderstorm or whatever.

A : Yes.

Q : Do you agree that if they are left in the rain and sun for a long time, the goods will get damaged?

A : Yes.

Q14 & Q33 – Statement of witness:

The floor was normal sand and pebbles.

Q20 – E:

I did not deal with the plaintiff personally.

Q : So your answer to Q20 could not be correct. Derek Yew dealt with the plaintiff.

A : I agree. I agree I don't know what was the dealing between Derek Yew and the plaintiff. Now witness says, 'The answer to Q20 is wrong. I don't know what the plaintiff and defendant agreed'.

Q : So Q21 is also wrong?

A

Philip Chai : I object to this question as witness has answered, he did not receive any instructions from the plaintiff.

Q : Did Derek Yew give you any instructions?

A : Derek Yew did not give me any instructions.

B

[34] DW2 stated that when the defendant shifted premises, the plaintiff's good were moved directly into the covered warehouse at the new premises and the defendant did not leave the goods outside anywhere to get wet. He then volunteered:

C

Actually before shifting to the new warehouse we had moved the plaintiff's goods into the covered warehouse at Lot No 2 (ie where the old premises was located).

He said that the plaintiff removed the ten crates of goods in
D November 1986 whereas the defendant moved the goods into the covered warehouse at the old premises in December 1986.

[35] DW2 testified further in cross-examination that the goods were in the covered warehouse when PW3 came to inspect them and he was not sure whether the goods had already been discovered
E to have been damaged when this happened. He disagreed with the suggestion that when the goods were shifted to the new premises, they were first put in the open yard and that was what he told PW3 when the goods were found to be damaged by water. He, however,
F said that he told PW3 that the goods were put in the covered warehouse in the new premises because there was surplus space and for better protection. The following questions were then asked and answered:

Q : Why didn't you move the goods earlier?

G

A : Because initially the contract was for storage in open yard. Later when the customer took out 11 crates (twice) and it happened that during one of the inspections I found some stones near the goods so I was concerned about the breakage of the glass. At the time the storehouse has surplus space
H so for better protection we brought the glass in.

Q : I put it to you that you moved the goods into the covered warehouse upon discovering the goods were damaged?

A : It's not true.

I

[36] DW2 then went on to say that when he shifted the goods into the covered warehouse in the old premises, he noticed that the crates were wet. He disagreed that he did this because the goods were wet and that PW3 discovered the goods to be wet in the new warehouse.

[37] In re-examination, DW2 said that the defendant covered the goods with tarpaulin and planks as an extra service. He added that the goods were lifted by ropes:

> We use ropes to lift the goods. The ropes will lift up the panels and the forklift will lift up the ropes. This is the method used to move the goods from one warehouse to another.

He further testified as follows in relation to the movement of the goods:

> The goods were first stored in Lot 2 in 1985. They were then moved to the covered warehouse at Lot 2 in 1986. In July 1987 they were stored in Lot 6 in covered warehouse and finally in 1992 to Lot 5 in a covered warehouse.
>
> I first discovered that the glasses were wet when we first shifted the goods from the open yard into the covered warehouse in Lot 2.

He also stated that "there was no way the goods could be wet by water once they were removed into the covered warehouse."

[38] PW1, one Encik Yusof bin Gulam, a marine surveyor, testified that he carried out an inspection of the crates on 2 March 1988 and found the sheets of glass therein damaged. He also testified that if the crates were kept in the open, ie outside the warehouse, they should be covered with canvas. However, when he inspected the crates, they were all in the warehouse.

[39] PW2, one Mr Wong Leong Gooi, who was a distributor of glass products for use in buildings and an authority on glass used in the building industry, testified to the effect that laminated glass can be damaged by water if it is not dried immediately. He then gave the following evidence:

> Normally glass is stacked many pieces together and they are separated piece by piece with paper. If water gets in between these glasses it will react with the paper which has chemical content. It will then create marks on the glass which we call in the glass term as 'weathering'. The effect of weathering is it gives rainbow colour image on the glass which cannot be removed.

A The glass which is affected by water must be removed within a few hours, piece by piece, in order to avoid damage, ie weathering.

Pages 39-44 – B refers:

If the glass is imported they are usually packed what we call
B 'export packing' ie the box is not fully covered. The pictures show how the glasses are packed.

The crates containing the glass should not be exposed to rain as we know that water will damage the glass.

C If the crates are stored in open area they should be covered. It is normal practice.

From my experience, normally they are stored inside the building but if there is no space they can be stored outside but must be properly covered.

D

If they are properly covered they are sufficiently protected.

Any type of glass that is packed together can be damaged if water gets in between them. In the glass business this is common knowledge.

E

Pages 33-38 – B:)

) refers

Pages 37-38 - B:)

F I agree with the conclusion.

We have to look at the actual situation of the case, ie we look at the box and the paper. If the paper is crumpled we know that the whole box is affected. Then we do a random check. If the glass is damaged then generally all the glasses in the box are damaged.
G This is how it is generally done through my experience.

Once the glass is weathered, it cannot be used at all, for any purpose. We cannot use chemicals to clean the glass.

When the boxes are stored outside, normally there is a base to
H support them. If the base is properly set out, there is no problem.

[40] PW2 was cross-examined at length as to the extent of his knowledge in the glass business and he acquitted himself well. He confirmed that the glass can be damaged if water gets in and also
I if the glass is kept in the open and that normally people in the glass industry would not put glass outside without protection, ie without cover.

[41] Against the facts as narrated above, the issue for the learned trial judge to determine was whether the damage to the goods occurred during the storage of the goods with the defendant and whether it was due to the defendant's failure to take all reasonable care as a general warehouseman.

[42] When the goods were delivered to the defendant, a bailor-bailee relationship respectively was created between the parties pursuant to section 101 of the Contracts Act 1950 ("the Act"). Sections 104 to 106 of the Act provide as follows:

Care to be taken by bailee.

104. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

Bailee when not liable for loss, etc, of thing bailed.

105. The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 104.

Termination

106. A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

ILLUSTRATION

A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

[43] A scrutiny of the evidence, which we, as an appellate court, have to undertake where the learned trial judge has made no findings as to the facts, shows that the forty-eight crates were received in good condition and stored in the open as per the agreement exh. P2. The evidence of DW2 was highly suspect as, although he admitted covering the crates with the goods in them, he contended that he did so to protect the goods against breakage and as a gesture of goodwill. On the other hand, PW3 said he agreed to the goods being stored in the open upon the assurance that was given that the goods would be covered, and which in fact did occur. PW3 was told there was insufficient space in the covered warehouse to store the goods and that was why he agreed to storage

A in the open upon the said assurance being given. We found that the facts supported this contention of the plaintiff as the reason given by DW2 for covering the goods partially should be rejected. If DW2 was genuine in what he said was the reason, then all the goods should have been covered all the time. As against this, PW3 said
B all the goods were covered and remained covered up to the time the eleven crates of goods were removed from the defendant's care on the two occasions. This was borne out by the fact that the contents of those eleven crates were not damaged by rain, bearing in mind the testimony of DW2 where he agreed that the goods would have
C got wet on the first occasion that it rained.

[44] We found that it was only when the remaining goods had been moved to the defendant's new premises that they were discovered to be damaged, by PW3. We observed that the defendant
D had moved the remaining goods into a covered warehouse at its new premises, contrary to its stand that the goods were only required to be stored in the open under the agreement. We also noted that the goods were partially covered with tarpaulin that had holes. It was obvious to us from the facts that the damage to the
E goods must have occurred after the second act of removal of the ten crates from the custody of the defendant to the relocating of the remaining thirty-seven crates to the covered warehouse. The damage to the remaining goods would most likely have occurred either at the defendant's old premises or when the defendant shifted to its
F new premises but failed to continue to protect the goods as it had initially undertaken to do.

[45] We also found that the defendant realised that the remaining goods had been damaged and that was why they were moved into
G the covered warehouse at its new premises, bearing in mind the defendant's contention that it did have space in the old premises for storage in the covered warehouse but that the plaintiff had opted for open storage as it was cheaper. So as the defendant was motivated by economic considerations in not allowing the plaintiff's goods to
H be stored in the covered warehouse at its old premises, we could not accept any altruistic reason for the defendant to suddenly have had a change of heart to move the remaining goods into the covered warehouse at its new premises. This could only mean that when the defendant realized that the remaining goods in its care
I had been damaged, it moved with alacrity to store the remaining goods in the covered warehouse at its new premises. We therefore

found that the defendant as bailee of the remaining goods had not discharged the duty imposed upon it to take as much care of the remaining goods as it should have throughout the period of bailment as a man of ordinary prudence would, under similar circumstances, have taken care of his own goods of the same bulk, quality and value as the goods bailed. The defendant therefore had failed in its duty as a bailee to take as much care of the remaining goods as it was bound to do under s. 104 of the Act.

[46] It was our view that as the defendant had fallen foul of s. 104 of the Act, that part of the agreement which required the plaintiff to pay the storage fees became voidable at the option of the plaintiff as bailor pursuant to s. 106 of the Act, justifying the plaintiff in not paying the storage fees under the agreement. We accordingly found that the learned trial judge not only erred in dismissing the plaintiff's claim, she erred further in allowing the defendant's counterclaim.

[47] We have found it necessary to set out *in extenso* in this judgment the details of the evidence to avoid having to analyse the same piecemeal to justify our reversing the decision of the learned trial judge. We were of the view that setting out the evidence as we have done in this judgment will show the various inconsistencies and discrepancies in the overall evidence adduced on behalf of the defendant which did not at all support the decision made by the learned trial judge.

[48] The plaintiff relied on the following authorities in support of its case in the arguments before us:

1. Sections 104 and 105 of the Contracts Act 1950
2. *Halsbury's Laws of Malaysia* Vol 20 (Bailment)
3. *Abdul Rahman v. Ariffin* [1956] 1 LNS 4
4. *Sime Darby Ltd v. Port Swettenham Authority* [1966] 1 LNS 179
5. *Sharikat Lee Heng Sdn Bhd v. Port Swettenham Authority* [1971] 1 LNS 133 (FC)
6. *Port Swettenham Authority v. TW Wu and Co (M) Sdn Bhd* [1975] 1 LNS 124 (FC)

7. *Port Swettenham Authority v. TW Wu and Co (M) Sdn Bhd* [1978] 1 LNS 146 (PC)

8. *Malayan Thread Co Sdn Bhd v. Oyama Shipping Line Ltd & Anor* [1972] 1 LNS 82

9. *Lembaga Pelabohan Swettenham v. Syarikat Hiap Bee* [1975] 1 LNS 85

10. *Jaya Jusco Stores Sdn Bhd v. Sime Darby Security Services Sdn Bhd & Ors* [1999] 1 LNS 175

11. *United Engineers (Malaysia) Bhd v. Yeong Sinn Hoong* [1989] 1 LNS 125

12. *Hong Realty (Pte) Ltd v. Chua Keng Mong* [1994] 3 SLR819

13. *Laws of Insurance* by Poh Chu Chai (3rd edn)

14. *Leong Brothers Industries Sdn Bhd v. Jerneh Insurance Corp Sdn Bhd* [1991] 1 CLJ 135; [1991] 3 CLJ (Rep) 152

15. Section 114(g) of the Evidence Act 1950

16. *Watt (Or Thomas) v. Thomas* [1947] 1 All ER 582 (HL)

17. *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545

[49] The defendant, on the other hand, relied on the following authorities produced before us in its bundle of authorities:

1. Sections 103, 104 and 105 of the Contracts Act 1950

2. Sections 91 and 92 of the Evidence Act 1950

3. *Port Swettenham Authority v. TW Wu and Co (M) Sdn Bhd* [1975] 1 LNS 124

4. *Rothmans of Pall Mall (M) Bhd v. Neo Kim Har & Anor* [1989] 1 CLJ 59; [1989] 2 CLJ (Rep) 404

5. *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ Supp 147

6. *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1

7. *Seino Merchants Singapore Pte Ltd v. Porcupine Pte Ltd* [2000] 1 SLR 99

8. *Ramachandran a/l Mayandy v. Abdul Rahman bin Ambok Laongan & Anor* [1996] 1 LNS 109

9. *Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd* [1993] 3 CLJ 188

10. *Tithes Dental & Photo Supply Sdn Bhd v. Empresa Lineas Maritimes Argentinas & Ors* [1977] 1 LNS 147

[50] In our view, there was a general consensus between the parties on the applicable law except that some of the authorities produced were not relevant. But what was more important were the findings of facts which the learned trial judge should have made and as to how the law should have been applied to the facts. With respect, the learned trial judge was certainly in error in her decision as the facts, as any court should have found, could not justify a decision in favour of the defendant, having regard to the statute law with which we have dealt earlier in this judgment. That statute law has been elaborated in case law and we would cite some of those authorities to show where the learned trial judge erred.

[51] *Halsbury's Laws of Malaysia* vol. 20 on bailment, cited by the learned counsel for the plaintiff, sets out at para. 340.045 on whom the onus of proof lies when a chattel which is entrusted to a custodian is lost, injured or destroyed. It states that such onus is on the custodian to show that the injury did not happen in consequence of any neglect on the part of himself, or on the part of his servants acting within the course of their employment to use such care and diligence as a prudent or careful man would exercise in relation to the property.

[52] For the reasons we have given in the foregoing part of this judgment, it was crystal clear from the fact that when the forty-eight crates of goods were entrusted to the care of the defendant in good condition and subsequently eleven of those crates were removed by the plaintiff still in good condition, the onus was on the defendant to prove that it continued to exercise the same degree of care over the remaining thirty-seven crates left in its custody and under its care. It was therefore incumbent and a duty lay on the defendant to show that those remaining thirty-seven crates did not suffer the damage they underwent as a result of any neglect on the

part of the defendant or its servants. This duty, in our view, the defendant failed to discharge. The defendant undertook to keep the goods covered and it did do that as evidenced by the fact that when the eleven crates of goods were removed, they were found to be in good condition. At some point in time while the remaining thirty-seven crates were still in the defendant's custody and care, they became exposed to water and were damaged as a result of that. The defendant therefore could not deny its responsibility for their being damaged as it was obvious that this occurred because of neglect on the part of the defendant or its servants in failing to continue to keep the crates with the goods inside covered properly.

[53] As a warehouseman and bailee of the goods, the defendant had a right to be informed of the quality and value of the goods bailed and any prudent warehouseman as bailee would have insisted on being so informed. The defendant then could not deny that it had no knowledge of the delicate nature of the goods, especially in light of the plaintiff's positive assertion that the defendant was so informed and acknowledged this by covering the goods at the outset itself.

[54] In the case of *Port Swettenham Authority v. TW Wu and Co (M) Sdn Bhd* [1978] 1 LNS 146; [1978] 2 MLJ 137, at pp. 138 to 139, the Privy Council, in an appeal from Malaysia, after setting out the predecessor sections of ss. 104 and 105 of the Act, dealt with the onus of proof in cases of bailment in the following terms:

> Their Lordships consider that the onus is upon the defendants under sections 104 and 105 to prove that they had taken as much care of the plaintiffs' goods as a Port Authority of ordinary prudence would, under similar circumstances, have taken of its own goods of the same bulk, quality and value as the 64 lost cases. See *Lee Heng v. Port Swettenham Authority* [1971] 2 MLJ 27 at page 29, and *Indian Contract and Specific Relief Acts* by Pollock and Mulla 6th ed at page 521 in which the learned authors, who are generally regarded as authorities of great weight, state:
>
> > In cases governed by the provisions of sections 151 and 152, [which correspond exactly with sections 104 and 105 *(ibid)*] the loss or damage of goods, entrusted to a bailee is *prima facie* evidence of negligence, and the burden of proof, therefore, to disprove negligence lies on the bailee.

Their Lordships respectfully agree with this statement of the legal position. It has, however, been argued on behalf of the defendants that neither sections 104, 105 nor 114 spell out that the onus lies upon them to prove that they took the degree of care specified in section 104 in respect of the 64 missing cases. Section 114, for example, reads:

> If, **by the default of the bailee,** the goods are not returned, delivered, or tendered at the proper time, he is responsible to the bailor for any loss … of the goods from that time.

If there is nothing in the sections to establish with certainty whether the onus is upon the bailor to prove the default, or upon the bailee to disprove it, these sections must be interpreted in the light of the common law. Pollock and Mulla, however, comment upon section 161 of the Indian Contracts Act [which is in exactly the same terms as section 114] at page 531, 6th ed, as follows:

> Unexplained failure to return the thing bailed is presumed to be by the bailee's default.

For this proposition they cite an Indian authority, *Kush Kanta Barkakati v. Chandra Kanta Karkati* [1923], where, as they rightly say,

> the English authorities on which this section is founded are cited at some length.

The Civil Law Act, 1956, provides:

3(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956.

It is true that Malaysian law sets a single standard of care for all bailees – whether they are bailees for reward or gratuitous bailees – and it corresponds to the standard required of a gratuitous bailee at common law. This standard, although high, may be a less exacting standard than that which the common law requires of a bailee for reward. But the line between the two standards is a very fine line, difficult to discern and impossible to define. After all, a man of ordinary prudence would presumably take reasonable care of his own goods. However this may be, there is no doubt that under Malaysian law interpreted in the light of the common law, as it always has been by the Malaysian courts and by this Board, **the**

> **onus is on the bailee to show that he has taken the care required by the law, of the goods entrusted to him.** (emphasis added)

[55] Strangely, although the learned council for the defendant cited the same case as authority in respect of the defendant's position, only the report of the case in the Federal Court, and not of that in the Privy Council, was included in the defendant's bundle of authorities. However, that decision of the Federal Court was of no assistance to the case for the defendant as it also asserted that where a bailor and bailee relationship has been established, all that the plaintiff has to do is to prove that he entrusted the goods to the defendant who could not deliver them on demand in the same condition in which they had been entrusted, and the onus of proof then fell on the defendant as bailee to show that the loss or damage was not due to his negligence. That principle of law was reiterated by the Privy Council in the same case *(supra)* on appeal to it, while dismissing the appeal wish costs. We would state that the law as laid down by the Privy Council in that case remains unchanged up to the present.

[56] Finally, in *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545, this court evaluated afresh the evidence adduced at trial in that case when it held that the trial court had so fundamentally misdirected itself that the appellate court had a duty to intervene on the basis that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion. In that case, the appellate court evaluated the evidence afresh despite the trial judge having made certain findings of fact in his written judgment. This is what Gopal Sri Ram (subsequently FCJ) and Mahadev Shankar JJCA had to say at p. 549 of the report of that case:

> We are fully conscious that this is an appeal that turns upon a question of fact. However, a careful reading of the trial judge's judgment shows that the process of reasoning adopted by him for preferring the evidence of the defence witnesses is based upon a wrong premise and does not accord with a well-settled principle that goes to form the fulcrum upon which the scales of procedural justice turn.

[57] In the appeal before us, as we did not have the benefit of reading the grounds of judgment of the learned trial judge, we had to evaluate the evidence afresh, which we were entitled to do in the

circumstances. We could find no inferences which could be made from the facts to support the decision of the learned trial judge. We accordingly set aside her decision, entered judgment for the plaintiff as per the statement of claim and dismissed the defendant's counterclaim with costs. We ordered the refund of the deposit to the appellant plaintiff and awarded costs of RM15,000 against the respondent defendant in respect of the trial in the High Court and the hearing before us.

[58] My learned brother judges, Low Hop Bing and Ramly Hj Ali JJCA, have read this judgment in draft and have expressed their concurrence with it.